

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALFRED E. SLUSHER
Claimant

VS.

**WONDERFUL HOUSE CHINESE
RESTAURANT, INC.**
Uninsured Respondent

AND

**KANSAS WORKERS COMPENSATION
FUND**

Docket No. 1,038,908

ORDER

STATEMENT OF THE CASE

The respondent and the Kansas Workers Compensation Fund (Fund) requested review of the August 18, 2008, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller. Mitchell W. Rice, of Hutchinson, Kansas, appeared for claimant. Wendel W. Wurst, of Garden City, Kansas, appeared for respondent. D. Shane Bangerter, of Dodge City, Kansas, appeared for the Fund.

The Administrative Law Judge (ALJ) found that the Kansas Workers Compensation Act applies in this case, as it would be reasonable to anticipate that respondent would have a gross annual payroll, excluding family, in excess of \$20,000 for the calendar year 2008. Further, the ALJ found that respondent is not financially able to pay the previously ordered compensation, medical bills and medical treatment and, therefore, ordered the same to be furnished by the Fund.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 11, 2008, Preliminary Hearing; the transcript of the deposition of Benson Xiang a/k/a Bei Sheng Xiang taken July 7, 2008, and the exhibits; and the transcript of the June 2, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that pursuant to the provisions of K.S.A. 44-505, the Workers Compensation Act does not apply to claimant's employment with respondent, arguing that "the current calendar year" contemplated by K.S.A. 44-505(a)(2) and (3) is the year 2007. Since respondent began business on December 6, 2007, it reasonably estimated that it would not have a payroll in excess of \$20,000 for the year 2007. Further, respondent estimated that its 2008 total non-family annual gross payroll would be less than \$20,000.

The Fund argues that "the current calendar year" as that term is used in K.S.A. 44-505(a)(3) is 2007. Since respondent was not open in 2006, the application of the Act depends upon whether respondent reasonably estimated that it would not have a gross annual payroll of \$20,000 in 2007, and that no reasonable estimate would have resulted in an estimate of a gross, non-family payroll in excess of \$20,000. The Fund, therefore, requests that the Board dismiss this case due to lack of jurisdiction as claimant failed to meet the jurisdictional requirements of K.S.A. 44-505(a)(3). In the alternative, the Fund requests that the Board reverse the ALJ's determination that respondent is insolvent and order respondent to pay claimant's medical bills and compensation.

Claimant contends that he has satisfied his burden of proving that the Workers Compensation Act applies to claimant's employment and that K.S.A. 44-505(a)(3) did not exclude coverage. Claimant argues that respondent could not in good faith claim that it was not subject to the Act on December 26, 2007, the date of his accident, because it could reasonably estimate that its 2008 total gross annual payroll would exceed \$20,000.

The issues for the Board's review are:

- (1) What is meant by "current calendar year" for purposes of K.S.A. 44-505(a)(2) and (3)?
- (2) Could respondent reasonably estimate that it would not have a total gross annual payroll for the current calendar year of \$20,000 for all employees?
- (3) If respondent is a corporate employer, does its payroll include "family members"?
- (4) Does the Board have jurisdiction over the issue of respondent's ability to pay the ordered compensation and medical bills? If so, is respondent financially unable to pay the ordered temporary total disability compensation and medical expenses?

FINDINGS OF FACT

Claimant was injured while in the course of his employment with respondent on December 26, 2007, when he slipped and fell on ice, breaking his right elbow. Respondent

was uninsured on December 26, 2007. After a preliminary hearing, the ALJ, on June 4, 2008, found that claimant met with personal injury by accident that arose out of and in the course of his employment and ordered respondent to pay claimant's outstanding medical bills, medical treatment, and temporary total disability compensation. The ALJ found that respondent had failed to prove its insolvency. But at a subsequent preliminary hearing held August 11, 2008, the ALJ found that respondent is uninsured and financially unable to pay the ordered compensation. Accordingly, at the second preliminary hearing, the Fund was ordered to pay the benefits that respondent had been ordered to pay at the first preliminary hearing.

Bei Sheng Xiang, respondent's owner, testified that respondent was incorporated on June 25, 2007. He was listed as the incorporator. He testified that although he had applied for workers compensation insurance, that coverage did not begin until December 28, 2007, two days after claimant's injury.

Mr. Xiang testified that respondent opened for business on December 6, 2007, and had no employees before December 2007. Respondent's total payroll in 2007 was \$8,043.99, which includes the wages paid to family members. In the first six months of 2008, respondent paid \$26,380.11 in wages. Of that amount, \$11,690.30 was paid to non-family members. However, Mr. Xiang testified that respondent's non-family member employees were all temporary employees who were helping him get the business started. The last non-family member employed by respondent was Jian Ying Cai, whose employment ended June 1, 2008. As of the date of Mr. Xiang's deposition, July 7, 2008, respondent had no non-family employees and did not plan to hire any employees during the remainder of 2008 who were not related to him or his wife by blood or marriage.

Mr. Xiang testified that respondent lost money in December 2007. He also testified that the business lost money the first six months of 2008. Mr. Xiang had sold a business in Colorado for \$50,000. Of that amount, he received \$40,000 and \$10,000 was to be paid to him in monthly payment of \$1,023.06, and four more payments remained to be paid. A portion of the money he received from the sale of that business went to pay back relatives who had loaned him money. He is now paying back relatives and friends who loaned him money to start his current restaurant business, testifying that he owes those relatives and friends the amount of \$80,000. He stated that respondent, therefore, was unable to pay claimant's medical bills and weekly disability compensation.

After the second preliminary hearing held August 11, 2008, the ALJ found that K.S.A. 44-505(a)(2) was applicable to this case and that it was reasonable to assume that respondent would have in excess of \$20,000 in gross annual payroll, excluding family, for the calendar year 2008. As previously noted, the ALJ further found that respondent was financially unable to pay the benefits ordered on June 4, 2008, and ordered the same to be paid by the Fund.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden to prove coverage under the Act also includes whether respondent has the requisite payroll requirements as set forth in the Act.¹ K.S.A. 44-505(a) exempts from application of the Kansas Workers Compensation Act the following:

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

(3) any employment . . . wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection.

In order to be subject to the provisions of the Act, the above statute establishes a two-prong test. First, the employer must have had an annual payroll for the preceding calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will have a gross annual payroll for the current calendar year of more than \$20,000 for all employees, excluding family members. If there was no payroll for the prior calendar year, then only the current calendar year is considered. In *Fetzer*, the Kansas Court of Appeals interpreted the current calendar year as referring to the calendar year of the injury.²

¹ *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 154, 613 P.2d 389 (1980).

² See *Fetzer v. Boling*, 19 Kan. App. 2d 264, 867 P.2d 1067 (1994).

K.A.R. 51-11-6 states:

In computing the gross annual payroll for an employer to determine whether they are subject to the workers' compensation act, all payroll paid by that employer to all workers shall be included. The computation shall include all payroll whether or not that payroll is paid to employees in the state of Kansas or outside the state of Kansas.

The provision in K.S.A. 44-505 excluding the payroll of workers who are members of the employer's family shall not apply to corporate employers.

A corporate employer's payroll for purposes of determining whether the employer is subject to the workers' compensation act shall be determined by the total amount of payroll paid to all corporate employees even when a corporate employee has elected out of the workers' compensation act pursuant to K.S.A. 44-543.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,³ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

K.S.A. 44-532a(a) states:

If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁵

ANALYSIS

The ALJ erred by considering respondent's expected payroll for the 2008 calendar year. A strict reading of the applicable statute, K.S.A. 44-505(a)(3), requires that the \$20,000 payroll threshold for coverage under the Act must be reached during "the current calendar year." Claimant was injured on December 26, 2007. Therefore, the current calendar year for this claim is 2007. The anticipated payroll for 2008 is irrelevant to the determination of whether the Act applies to this accident.

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁴ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁵ K.S.A. 2007 Supp. 44-555c(k).

Respondent was not incorporated until 2007 and did not begin doing business until 2007. Therefore, K.S.A. 44-505(a)(2) is not applicable to this claim because there was no "payroll for the preceding calendar year." K.S.A. 44-505(a)(3) applies to "any employment . . . wherein the employer has not had a payroll for a calendar year." As respondent neither had nor reasonably anticipated having a gross annual payroll exceeding \$20,000 for the 2007 calendar year, the Act does not apply to this claim. This is a harsh result, as it does not seem likely that the Legislature would have intended to exclude an employer from the Act which did not commence business operations until December of the calendar year and which could reasonably anticipate a total gross annual payroll exceeding \$20,000 for the subsequent year and for any full 12-month period. Nevertheless, claimant's remedy lies with the Legislature.

CONCLUSION

(1) The current calendar year is the year in which the accident occurred, in this case 2007.

(2) Respondent did not have a total gross annual payroll of \$20,000 in 2007, including family members.

(3) The Kansas Workers Compensation Act does not apply to this employment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated August 18, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
D. Shane Bangerter, Attorney for Kansas Workers Compensation Fund
Pamela J. Fuller, Administrative Law Judge